

Ram Singh Vs State

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: May 13, 1958

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 164, 364, 533
Evidence Act, 1872 â€” Section 17, 24

Citation: AIR 1959 All 518 : (1959) CriLJ 1134

Hon'ble Judges: R.N. Gurtu, J; A.N. Mulla, J

Bench: Division Bench

Advocate: R.A. Misra and S.B. Mathur, for the Appellant; Shankar Sahai, for the Respondent

Final Decision: Allowed

Judgement

A.N. Mulla, J.

Appellant Ram Singh has been convicted u/s 302 I. P. Code by the Additional Sessions Judge, Unnao, and sentenced to

death. Five other accused persons, namely Kirpa Shanker alias Lala Misra, Krishna Kumar alias Chhuttan, Mahesh Prasad, Lallu and Brahma

Kishore alias Phunnar, were also prosecuted in this case but they were acquitted. The charge against the appellant and the other accused persons

was that they committed a riot with deadly weapons, such as pistols and guns, on the night between the 14th and 15th July, 1956, near the culvert

of village Bighapur and in pursuance of the common object of the unlawful assembly they committed the murder of Shankeri Brahmin by shooting

him dead. The learned Judge has made the usual reference for the confirmation of the death sentence awarded to the appellant.

1A. The prosecution story is that Shankeri deceased resided in village Ghatampur, Police Station Bara Sagwar, district Unnao, and ostensibly he

carried on the profession of a tailor. Shankeri's wife P. W. 4 Shrimti Ramkali lived with him and his father P. W. 13 Kedar Nath Pande also

resided in a nearby house. The deceased and the accused persons in this case were members of a gang of opium and Ganja smugglers and they

occasionally looted motor trucks and lorries in which these articles were transported. For this purpose they used to disguise themselves in police

uniforms and thus carried out their crimes.

The leader of this gang was Mahesh Prasad, who was also a resident of village Ghatampur, but who ostensibly carried out some business.in

mohalla Hatia Bazar in Kanpur town. Ram Singh appellant was a resident of village Hathigaon, police station Maharajpur, district Kanpur, but he

resided at Bighapur in Unnao district where he sat on the shop of Brahma Kishore alias Phunnar accused. The deceased and the accused persons

were on intimate terms and they used to meet frequently. Shankeri deceased possessed a gun and he also ran a flour mill in partnership with

Mahesh Prasad.

This flour mill was at Ghatampur, but for some reasons it had closed down since about two years before the incident. In the course of their

transactions Shankeri deceased had become indebted to Mahesh Prasad upto Rs. 500/- and Mahesh Prasad frequently demanded his money.

Mahesh Prasad suggested to Shankeri that he should sell his gun and pay up the amount. He even suggested that a false report about the theft of

the gun might be lodged and some money might be paid to Sri Sultan Ahmed, station officer, Bara Sagwar, who would not investigate the matter.

It may be mentioned that according to the prosecution case Sri Sultan Ahmed was in league with the gang of Mahesh Prasad and he used to

receive frequent payments from the members of this gang.

There was a rival gang led by Ram Kumar and his brother Lallan and the relations between the two gangs were highly strained. Shankeri deceased

instead of following the advice given by Mahesh Prasad contacted Ram Kumar, who gave him some money and Shankeri paid back the debt of

Mahesh Prasad. This created a suspicion in the mind of Mahesh Prasad that Shankeri had now joined Ram. Kumar's gang and was thus a source

of potential danger.

It was, therefore, decided by Mahesh Prasad and the other members of his group to kill Shankeri. Some 10 or 11 days before the incident the

appellant and Phunnar had some talk with Shankeri in which some threats were extended. The deceased retaliated that he would expose Mahesh

Prasad and Phunnar in the matter of a bomb explosion case. It so appears that some time before the incident Ram Kumar and his brother Lallan

were injured in a bomb explosion. This perhaps made Mahesh Prasad find his companions all the more determined to kill Shankeri.

2. According to the prosecution the conspirators met on the afternoon of 13-7-1956, in village Bighapur at a place known as Phunnar's Phatak. It

was decided to kill Shankeri and so the next day i.e. on 14-7-1956, the appellant and Phunnar came to Shankeri's house at about midday and

took him with them to Pandepur for making some purchases. Shanker deceased came back to his house at about 5 in the evening and shortly

afterwards the appellant and Phunnar again came to his house and told Shrimati Ramkali, the wife of the deceased, that Shankeri was going out to

dine with them.

Shrimati Ramkali saw that the deceased took out his Khaki clothes, his gun and cartridges, his torch and some other personal articles and then

went on a bicycle with the appellant and Phunnar. One Jagdish barber (P.W.5), who was a servant of the deceased, accompanied the party upto

Hardewan temple which was at a short distance, but he was sent back from there by the deceased. The way Shankeri had departed did not excite

any suspicion in the mind of Shrimati Ramkali because Shankeri occasionally went out in this manner. When, however, Shankeri did not return

home, Shrimati Ramkali felt a little anxious and informed her father-in-law Kedar Nath about it, but her suspicions were quietened by Kedar Nath

who said that Shankeri would come back next morning. Next morning i.e. on 15-7-1956, at about 8 in the morning Manohar, a servant of Phunnar

came and informed Shrimati Ramkali that her husband had been shot dead and his body was lying near the culvert of village Bighapur.

This culvert was about two miles away from village Ghatampur. Shrimati Ramkali along with her father P. W, 28 Beni Madho and some others

rushed upto the culvert and found the dead body of Shankeri lying just below the culvert with three pistol shots. Phunnar's brother Dhunnar and

Kirpa Shanker alias Lala Misra were present near the corpse and they told Shrimati Ramkali not to say anything till the arrival of Mahesh Prasad

and the police.

It was in these circumstances that no information was sent to police station Barasagwar which was about eight miles away. At about 5 in the

evening Sri Sultan Ahmad came with Mahesh Prasad and it is alleged that it was at this time that a report was dressed up by Sri Sultan Ahmad and

Ganga Krishna (P. W. 37), the brother of the deceased, was given the role of dictating this report. P. W. 16 Ram Narain who was present at the

spot was sent to police station Bara Sagwar with this report and it was lodged on the night of the 15th of July, 1956, but the time of this report was

not correctly recorded and on the instructions of Sri Sultan Ahmad it was ante-timed. It purported to have been lodged at 9.15 A. M. on 15-7-

1936.

3. The contents of the report were also mutilated by Sri Sultan Ahmad because he was out to help Mahesh Prasad and his companions and so no

accusation was levelled in this report against any known person.

4. The case was first investigated by Sri Sultan Ahmad who did not even take down the statements of the prosecution witnesses in a proper

manner. Kedar Nath, the father of Shankeri deceased, was extremely dissatisfied with the way Sri Sultan Ahmad was investigating this case and so

he submitted several applications to the district authorities against the police of Bara Sagwar. On receipt of these complaints, the district authorities

ordered an inquiry against Sri Sultan Ahmad and Sri Mathura Singh, Deputy Superintendent of Police (Complaints) (P. W. 14) was entrusted with

this inquiry. Sri Mathura Singh was also authorized to investigate the murder case.

5. Meanwhile Sri Sultan Ahmad had completed his investigation and had submitted a charge-sheet against Ram Singh appellant alone on 26-8-

1956, under Sections 302/394 I. P. Code. When the complaints were received Sri Sultan Ahmad was ordered to make further enquiries and

finally the appellant along with the other five accused persons were prosecuted in this case. A charge of conspiracy u/s 120-B I. P. Code was also

levelled against them. (6) Ram Singh appellant had surrendered in court on 7-8-1956, and two days later he was released on bail by the Sessions

Judge. We have mentioned above that Sri Mathura Singh was conducting an inquiry under the provisions of the Prevention of Corruption Act

against Sri Sultan Ahmed. In the course of this inquiry Sri Mathura Singh examined some witnesses and he wanted to examine Ram Singh also. On

22-10-1956, Sri Mathura Singh was proceeding to Kanpur in search of Ram Singh and Mahesh Prasad, when he saw two men coming to Unnao

side on a motor cycle.

These two persons acted in a suspicious manner and tried to escape and so Sri Mathura Singh pursued them on the jeep. When he overtook them,

he found that one of them was Mahesh Prasad, whom he knew slightly from before. Mahesh Prasad informed Sri Mathura Singh that his

companion was Ram Singh. It is not disclosed as to what conversation took place between Sri Mathura Singh and Ram Singh or Mahesh Prasad

when they met on the road. We are only told that after this chance meeting, Ram Singh himself visited the bungalow of Sri Mathura Singh at about 4

P. M. the same day. He not only came to the bungalow of Sri Mathura Singh himself but, if the prosecution case is to be believed, he repeatedly

came to his bungalow during 4 and 6 P. M. Sri Mathura Singh was so unconcerned about these visits that he told Ram Singh that he was busy with

some work and he would come back to his bungalow at 12 in the night.

On one side Sri Mathura Singh claims that he wanted to interrogate Ram Singh and on the other side he was not willing to examine Ram Singh

even when he himself ordered to be interrogated. When Sri Mathura Singh came back late at night, he found that Ram Singh was sleeping under a

thatch at his house. No inquiries were made from Ram Singh even at night. Next morning at about 9 or 9-30 A. M. Sri Mathura Singh interrogated

Ram Singh.

It would thus appear that Ram Singh on his own insisted that he should be examined. Ram Singh appears to have given a long statement for though

his interrogation started at about 9 in the morning, it went on upto noon. After the statement of Ram Singh was recorded, Sri Mathura Singh

immediately contacted the Additional District Magistrate (Judicial), Unnao between 12 and 1 P.M. and asked him to appoint some judicial officer

to record the statement of Ram Singh.

7. If Sri Mathura Singh is to be believed Ram Singh was never taken in custody and his movements were not restricted. The Additional District

Magistrate (Judicial) on the application of Sri Mathura Singh directed Sri N. B. Singh (P. W. 36), who was a first class Magistrate at Unnao, to

record the statement of Ram Singh. It was an extremely curious coincidence that Sri N. B. Singh was the next door neighbour of Sri Mathura

Singh and only five yards divided their houses. Sri Mathura Singh then produced Ram Singh before Sri N. B. Singh when the Magistrate had come

to take his lunch. Sri N. B. Singh. did not want to examine Ram Singh at his bungalow, but it was Ram Singh himself who insisted that his statement

should be recorded at the bungalow as he was afraid that Mahesh Prasad would kill him if he came to know about it.

Sri Mathura Singh after placing Ram Singh before the Magistrate had left and according to the prosecution he was nowhere in the picture after that

time. The Magistrate first took his lunch and then took Ram Singh to his drawing room where Ram Singh dictated his statement and the Magistrate

recorded it. It was a long statement consisting of no less than 8 foolscap pages written in Hindi, but according to the Magistrate he performed this

feat Between 25 minutes to half an hour. No caution was administered to Ram Singh before recording his statement.

No questions were put to him at all and the Magistrate straightway started writing his statement. After the statement was recorded Ram Singh was

made to sign every page of the recorded statement and then this statement was forwarded to the District Magistrate Unnao. Ram Singh was not

taken in custody and after making this statement it seems that he went away and later on the same evening he was arrested by P. W. 21 Sri C. L.

Kulshreshtha, who was an Inspector of the C. I. D. (Investigation Branch), in connection with a crime u/s 307 I. P. Code and Section 5 of the

Indian Explosives Act.

It may be mentioned that this case related to the Bomb explosion which had occurred on 30-4-1956, in village Behtar, police station Achalganj,

district Unnao, in which Ram Kumar and Lallan were injured. It again appears strange that after giving his statement to Sri N. B. Singh, Ram Singh

seems to have come to the office of the Deputy Superintendent of Police (Complaints), Unnao, and it was here that Sri C. L. Kulshreshtha

arrested him. After his arrest Ram Singh was again questioned by Sri Kulshreshtha and a second confessional statement relating to the bomb

incident was recorded by this officer from 7 to 8 P. M.

8. It would thus appear that on 23-10-1956, Ram Singh was doing nothing else, but giving statements to the police officers and the Magistrate.

From 9 A.M. to 12 noon he gave his statement to Sri Mathura Singh. Then after lunch time he made his confessional statement before Sri N. B.

Singh. Then he himself came to the office of Sri Mathura Singh where he was arrested by Sri Kulshreshtha and then again made a long

confessional statement relating to another crime which went on for about an hour. After this Ram Singh was arrested and sent to jail.

9. It may be mentioned here that the appellant denied making the statement ascribed to him before Sri. N. B. Singh. He has contended that he was

coerced and also tempted to make this statement. He also contended that he was subjected to third degree methods before his statement was

recorded and actually it was P. W. 14 Sri Mathura Singh who had put a statement in his mouth which was subsequently recorded by the

Magistrate and the appellant himself only nodded his head at occasions. He also contended that he was taken in custody and the entire prosecution

story that he voluntarily visited the bungalow of Sri Mathura Singh was absolutely false. We will make our comments on the contentions advanced

by the appellant at another stage.

10. When the case came up in court, a large number of witnesses were examined by the prosecution. The following facts were sought to be

proved by means of these witnesses:

1. That a conspiracy was hatched a day before the incident at Phunnar's phatak between the appellant and the other accused persons in which it

was decided to kill Shanker deceased,

2. The appellant and Phunnar had come to the house of Shanker deceased and taken him away with them on the pretext that the deceased would

dine with them that night.

3. The deceased was seen in the company of the appellant and the other accused at the scene of the crime by a large number of witnesses. They

included the driver and the cleaner of a Motor Truck No. USU 288 which was proceeding from Lalganj to Kanpur at the relevant time. P. W. 24

RAM Lal driver and P. W. 15 Prem Sagar cleaner had seen the conspirators near the Bighapur culvert and these conspirators had tried to stop the

truck, but they did not succeed.

4. Police constables were examined to prove that Truck No. USU 286 crossed the Ganga Bridge at the relevant time.

11. Every one of the items mentioned above except No. 2 was found to be unbelievable by the trial court. We need not cover the same ground

again, but we would like to observe that the trial court has been a little charitable in its comments against the witnesses who had come to depose

about these facts. The evidence in respect of these facts, in our opinion, is not only unbelievable, but every one of them is a fabricated link and

there can be little doubt that it is the brain of Sri Mathura Singh, which is behind all this evidence. Incidentally we may observe that when complaints

were received against Sri Sultan Ahmad, the inquiry was entrusted to Sri Mathura Singh.

On the conclusions that we have reached, we have no doubt that Sri Mathura Singh has fabricated every bit of evidence in this case. Who will now

conduct the inquiry against Sri Mathura Singh and if an officer is found to conduct an inquiry against Sri Mathura Singh, what is the guarantee that

he will not be an improvement even upon Sri Mathura Singh? The police force seems to consist of so many undefendable officers that it is almost

impossible to investigate their misdeeds. Where the twigs are found to be decayed one hopes that the branches are safe but where the branches

have also become rotten one begins to doubt that even the trunk is sound. The rule of law cannot be maintained so long as the so-called guardians

of "law and order" are mostly composed of this class.

Unless the State thinks that to fabricate a false case in the interests of the prosecution is excusable, there seems to be no reason why Sri Mathura

Singh should not be put on the mat and made to explain how he explains the fictitious evidence which he produced in this case. The way Sri

Mathura Singh unlawfully arrested Ram Singh who was out on bail and then coerced him to make a confession is too apparent to be commented

upon. The type of story given by Sri Mathura Singh cannot convince even a school boy much less a court of law.

It is impossible to accept that Ram Singh was not taken in custody and he was willingly and voluntarily going to the bungalow of Sri Mathura Singh.

again and again as if he had no other desire except to put a rope round his neck, There is not the slightest doubt in our minds that Ram Singh was

taken in custody by Sri Mathura Singh and then after he was subjected to the peculiar ways of interrogation which officers like Sri Mathura Singh

know so well he was presented in a chastened mood before the Magistrate and the Magistrate who by his conduct showed that he was no better

than a police officer cooperated with Sri Mathura Singh in producing the desired result.

12. The conviction of the appellant rests almost entirely on the statement made by him before Sri N. B. Singh on 23-10-1956. The trial court

summing up the evidence against the appellant observed:

There is no direct evidence to show that while Shankeri was changing into this disguise he was shot dead by the five accused and the only

evidence is in Ram Singh's statement Ext. P-2, in which he stated that he was one of the persons who shot Shankeri with a country made pistol.-

The medical evidence clearly shows that the deceased received several wounds with a large sized gun or pistol fired thrice. This evidence is further

corroborated by the statement made by Ram Singh in Ext. P-2. This document has been held to be admissible and clearly implicates Ram Singh in

proving that he was one of the murderers. The evidence against Ram Singh proves that he took away Shankeri and the deceased was last seen

alive with Ram Singh and Phunnar. This evidence read with the state-merit of Ram Singh contained in Ext. P-2 clearly established that he was one

of the murderers.

13. It would be seen from the extract quoted above that there are only two pieces of evidence on the basis of which the trial court has convicted

the appellant. The first piece of evidence is the statement of Shrimati Ramkali (P. W. 4) to the effect that the appellant and Phunnar had taken the

deceased with them on the night of the incident and the second piece of evidence is the confessional statement of the appellant which the trial court

has treated as an admission and not as a confession. It is obvious that if this admission or confession is ignored, there is no satisfactory evidence left

against the appellant to connect him with the crime.

14. We will take the statement of Shrimati Bamkali first. Even if it is accepted, it is not sufficient by itself to prove the guilt of the appellant. Shrimati

Ramkali made a similar statement against Phunnar accused and the trial court did not convict Phunnar on her statement alone. We are also of the

opinion that the statement of Shrimati Ramkali on this point is not believable. It was not mentioned in the first information report that Phunnar and

the appellant had taken the deceased with them that night. Even if it is accepted that this fact was not mentioned in the first information report

because this document was dressed up by Sri Sultan Ahmad, who wanted to save Phunnar, we fail to understand why this fact was not mentioned

in any of the three complaints lodged by Kedar Nath Pande (P. W. 13), which he addressed to the district authorities.

The first complaint was sent on the 28th of July, 1956, to the S. P., Unnao, and the other two complaints were addressed, one to the S. P. of

Unnao and the other to the S. P. In-charge C. I. D., I. B. U. P., Lucknow. These two complaints were sent in October, 1956. In these complaints

the name of the appellant was mentioned along with the other accused persons, but the particular role that he took the deceased away from his

house that night was not given to him. The omission in these complaints makes it clear to us that this part of the prosecution case is an

embellishment and has been introduced at a very late stage.

We, therefore, cannot believe Shrimati Ramkali when she states that it was the appellant and Phunnar accused who took away the deceased from

the house that night. Shrimati Ramkali also appears to us to be an extremely untrustworthy witness and no reliance can be placed upon her words.

This piece of evidence, therefore, has no evidentiary value and it must be discarded.

15. We now come to the second piece of evidence, namely the statement of the appellant recorded by Sri. N. B. Singh, Additional S. D. M.,

Unnao, on the 23rd of October, 1956. This statement is Ex. P. 2. We would incorporate an extract from this statement. It runs as follows:

Shankeri left his gun standing by the tree and began to wear his uniform. When he was wearing pant Phunnar shot one bullet at Shankeri with his

gun. I, Chhuttan and Lallu had got Addha i. e., country made pistol and bullet of 12 bore fits in them. Then I and Chhuttan fired one bullet each at

Shankeri with our Addhas Shankeri fell down there and expired".

16. A mere reading of the extract given above makes it clear that it was not only a confessional statement but it was a plenary confession which

directly admitted guilt. It is, therefore, suprising that the trial court treated it as an admission and not as a confession. The word "confession" has

not been defined in the Evidence Act. Stephen in his Digest of the Law of Evidence defines it as follows:

A confession is an admission made at any time by a person charged with crime stating or suggesting the inference that he committed the crime.

This definition was acceptable to Mahmood J., in *Queen-Empress v. Babu Lal* ILR 6 All 509. Straight J., however, disagreed with this view in

Queen-Empress v. Jagrup ILR 7 All. 646. The view of Straight J. was followed in a majority of later decisions and it was approved by the Privy

Council. The Privy Council in AIR 1939 47 (Privy Council) made the following observations at page 52:

.....it may be useful to state that in their lordships' view no statement that contains "self exculpatory matter can amount to a confession, if the

exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in

terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact even a

conclusively incriminating fact is not of itself a confession, e. g, an admission that the accused is the owner of and was in recent possession of the

knife or revolver which caused a death with no explanation of any other man's possession.

Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's "Digest of the Law of Evidence" which

defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that

crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself

to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use

in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not

contained in the Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to

construe confession as a statement by an accused suggesting the inference that he committed" the crime.

17. It would be seen from the observations of their Lordships of the Privy Council that the language used in the definition given by Stephen is too

wide and it includes non-plenary confessions also as confessions. In order to distinguish between a confession and an admission a simple test can

be applied. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If on the other hand the statement falls short of it,

it amounts to an "admission." Where there is a direct admission of guilt, it is not possible to treat the statement as an admission.

The statement of the appellant quoted above clearly amounts to a confession because he admitted that he fired a pistol at the deceased which hit

him and which resulted in his death. It is, therefore, a plenary confession. There is no exculpatory part in this statement. According to Wigmore, a

confession is an acknowledgment in express words by the accused in a criminal case, of the truth of the guilty act charged or some essential part of

it. There are certain types of inculpatory statements which do not go to this extent.

An acknowledgment of a subordinate fact not directly involving guilt would be such a statement. So long as the inculpatory statement falls short of

being an admission of guilt, it can be treated as an admission. There is distinction between making a statement giving rise to an inference of guilt and

a statement which directly admits guilt. Where the admission extends only to the acceptance of a circumstance from which an inference of guilt can

be drawn, but which is not conclusive to prove the guilt, it can be treated as an admission.

In *State v. Novak* 109 Ia. 717 : 79 NW 465 (cited in "Shankar On Evidence" Seventh Edition p. 216) Granger J., observed:

Inaccurate use of such words as "confessions" "admissions" and "declarations" has led to some confusion in the cases; but, on authority and

reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope

and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term "confessions". A confession

is a voluntary admission or declaration by a person of his agency or participation in a crime.

18. In another American case *State v. Guie* 56 Mont. 485 (cited in "Shankar on Evidence" seventh Edition p. 217) Holloway J., observed:

The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but, based upon the substantive

differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and

by the very force of the definition, excludes an admission which of itself as applied in criminal law, is a statement by the accused, direct or implied,

of facts pertinent to the issue, and tending. in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorise a

conviction.

19. The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a

confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission. It is, therefore, obvious that the

trial court went astray when it treated the statement of the appellant, Ex. P. 2, as an admission and not as a confession. It labelled it as an

admission"" but used it as a "confession."

20. One of the reasons which perhaps led the trial court to treat this statement as an admission was that this statement of the appellant was not

recorded in the case against him, but in an inquiry against Sri Sultan Ahmad. Firstly the device adopted by Sri Mathura Singh to camouflage this

confession as an "admission" should not have deceived the trial court.

The character of the statement of an accused person is not affected by the fact that it is made in the case against himself or against someone else. It

is the contents of the statement which determine its species and by merely giving the label of "admission" to a "confession" it does not change its

essential character and does not cease to be a "confession". It remains a "confession" according to the requirements of law. As observed by the

learned Judges in the *State v. Kanbi Bhagwan Purshottam* AIR 1955NUC (Sau) 5765:

In order to determine whether a statement made by an accused to a police officer is merely an admission or confession the test is not whether the

police officer was investigating some other offences and not the particular offence with which the accused is charged. If an inference of criminality

of the person making the statement is to be gathered from the statement itself, and the prosecution does want the court to draw an inference of the

criminality in the sense that the accused thereby admitted having received stolen property, then the statement does amount to a confession and is hit

by section 25 and is not admissible in evidence.

It was open to the Magistrate who was recording the statement of the appellant to warn the appellant at the stage when he found that he was

making a confessional statement. If he had administered necessary caution to him and fulfilled the requirements of Section 164 Cr. P. C. at that

stage, the statement of the appellant could have been used against him.

The Magistrate, however, administered no such caution and did not observe the procedure laid down in Section 164 Cr. P. C. He also gave him

no time to think over the matter and the unholy haste with which he recorded the statement speaks more for his zeal than for his Judicial outlook.

The statement of the appellant, therefore, becomes inadmissible under the law.

21. There was some conflict of opinion between the Indian Courts on the point whether the non-observance of the provisions of Section 164 Cr.

P. C. was sufficient to throw out a confessional statement made by an accused. There were some decisions to the effect that this defect was cured

by Section 533 Cr. P. C. and its provisions were very extensively used by some of the courts. This controversy was set at rest by the Privy

Council in AIR 1936 253 (Privy Council) Their Lordships after referring to the conflict of opinion made the following observations:

Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not

less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all.

Other methods of performance are necessarily forbidden.

On the matter of construction Sections 164 and 364 must be looked at and construed together and it would be an unnatural construction to hold

that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the

construction adopted by the Crown, the only effect of Section 164 is to allow evidence to be put in a form in which it can prove itself under

Sections 74 and 80, Evidence Act Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section

conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all

the precautions and safeguards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle.

Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat promise, without

affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to

have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process

that the provisions of Section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present

case.

Referring to the conduct of the Magistrate in recording such confessions their Lordships went on to observe:

..... it is for obvious reasons most undesirable that the Magistrates and Judges should be in the position of witnesses in so far as it can be avoided.

Sometimes it cannot be avoided, as u/s 533 but where matter can be made of record and therefore admissible as such, there are the strongest

reasons of policy for supposing that the legislature designed that it should be made available in that form and no other.

In their Lordships' view it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial

persons; to be by reason of their position freed from the disability that attaches to police officers u/s 162 of the Code; and to be at the same time

freed, notwithstanding their position as Magistrates, from any obligation to make records u/s 164. In the result they would indeed be relegated to

the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity

unregulated by any statutory rules of procedure or conduct whatever.

22. The observations of their Lordships make it perfectly clear that the provisions of Sections 164 and 364, Cr. P. C., are to be strictly followed

by the Magistrates and unless they follow the provisions of these two sections, the statements recorded by them cannot be admitted in evidence

and their own evidence in respect of the statements which they recorded also becomes inadmissible. It is only when the formalities prescribed are

observed that the statement of the Magistrate and the record prepared by him can be used in evidence.

The above decision of the Privy Council has been widely followed by all the High Courts and it has also been approved by the Supreme Court in

Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, . Their Lordships of the Supreme Court observed at page 333:

It was urged on behalf of the respondent that this statement was not a confessional statement and was therefore not hit by Section 164 and Shanti

Lal Ahuja, the Additional District Magistrate, could therefore depose to such statement even though the same was not recorded as required by the

provisions of Section 164 of the Criminal Procedure Code. There is authority however for the proposition that once the investigation had started

any non-confessional statement made by the accused also required to be recorded in the manner indicated in that section and if no such record had

been made by the Magistrate, the Magistrate would not be competent to give oral evidence of such statement having been made by the accused.

See AIR 1936 253 (Privy Council) and The Superintendent and Remembrancer of Legal Affairs Vs. Lalit Mohan Singha Roy, followed in Abdul

Rahim and Others Vs. King-Emperor, and AIR 1937 254 (Nagpur) . The statement made by the Appellant No. 1 therefore to Shanti Lal Ahuja,

the Additional District Magistrate not having been recorded by him in accordance with the provision of Section 164 was inadmissible in evidence

and could not be proved orally by him.

23. The other decisions of the various High Courts which have followed this view are:

State Vs. Ram Autar Chaudhry and Others, , Mahfuz Ali (in Jail) Vs. State, Emperor Vs. Kommoju Brahman, In re Thothan AIR 1956 Mad 425

and Babbu Vs. State, .

24. As Sri N. B. Singh did not follow the procedure mentioned in Section 164 Cr. P. C. the statement of the appellant cannot be used against him

and Sri N. B. Singh cannot be permitted to depose on oath that the appellant made such a confession.

25. There are certain other major defects also which made this statement inadmissible in evidence. It has been mentioned by us above that the

charge sheet against the appellant was submitted on 26-8-1956 and he was released on bail even earlier on 9-8-1956. The confession was

recorded on the 23rd of October, 1956. It is, therefore, clear that it was recored after the charge sheet had been submitted.

While it is open to an accused person to con-less at any stage of the inquiry or trial, but a record of his confession u/s 164 Cr. P. C. cannot be

made after a charge sheet has been submitted. If such a record has been made it cannot be taken in. evidence as a confession u/s 164 Cr. P. C.

can be recorded only during the investigation of a crime and not subsequent to the closing of the investigation and the submission of the charge,

sheet. This was the view expressed in State Vs. Ram Autar Chaudhry and Others, .

26. This decision was again followed by another Divisional Bench of our High Court in Bachchan Lal Vs. The State, . On this ground also the

statement of the appellant is not admissible in evidence.

27. We are also of the opinion that the statement Ex. P. 2 is not a voluntary statement. We have no doubt in our minds that Sri Mathura Singh

unlawfully took the appellant in custody and after subjecting him to coercion he succeeded in getting this statement out of him. We are also of the

opinion that the appellant was in police custody when he made his statement before the Magistrate. It is inconceivable that the appellant himself

voluntarily went to Sri Mathura Singh and willingly passed a night at his house and even after his statement was recorded he again went to the

office of Sri Mathura Singh where he was arrested by Sri Kulshreshtha,

There is no doubt in our minds that since the 22nd of October, 1956, Sri Mathura Singh had taken the appellant in custody and he was using all

sorts of methods to extort a confessional statement from him. The crucial test is whether at the time when an accused makes a confession, he is a

free man or his movements are controlled by the police either by themselves or through some other agency employed by them for the purpose of

securing such a confession.

The immediate presence of a policeman or police officer is not necessary to prove that the accused was in the custody of the police. Even

temporary absence of a policeman or a police officer would not terminate his custody and the accused shall be deemed to be in the custody of the

police even in such circumstances. Two cases in point are " Emperor Vs. Mt. Jagia, and AIR 1944 105 (Nagpur)

In our view when the appellant was presented before Sri N. B. Singh, he was still in the custody of Sri Mathura Singh and his movements were not

free. No statement made by the appellant under these circumstances can be held to be voluntary. We feel no hesitation in accepting the statement

of the appellant in preference to the statement of Sri Mathura Singh and Sri N. B. Singh on this point.

Sri N. B. Singh by his conduct indicated that he was only functioning as a stooge of Sri Mathura Singh. By acting like this he has invited this

comment and it is really a very sad state of affairs that the word of a Magistrate cannot be preferred over the word of an accused. Sri N. B. Singh

also acted improperly when he recorded the statement of the appellant at his house. The explanation given by him is entirely unacceptable to us. It

was observed by Jagannadhadas J., in Khalli Behera Vs. The State,

I wish, however, to add that I consider it quite improper on the part of the Magistrate to have recorded the confessional statement of the accused

u/s 164 at his house without assigning any reason.

The reason given by the Magistrate in this case are quite unbelievable and we cannot help inferring that he was acting not as a judicial officer, but in

concert with Sri Mathura Singh.

28. That the confession was brought about by coercion, and unfair means can also be gathered from the general diary report Ex. P. 12 which was

recorded on the 23rd of October, 1956, when the appellant was taken to jail. It is mentioned in this report that the appellant refused to take food

when he was admitted to jail. This indicates that the appellant could not have voluntarily made these statements. He was suffering from a mental

depression which made him refuse the food which was offered to him. This mental depression could not have arisen if the appellant himself

voluntarily approached Sri Mathura Singh and made his confession. It seems to indicate that the appellant realized that he has been placed in a

terrible position and this was causing depression. We are, therefore, of the opinion that the statement made by the appellant was not even voluntary

and therefore, it has no evidentiary value.

29. For the reasons given by us above we have come to the conclusion that Ex. P2, the alleged admission of the appellant, is not admissible in

evidence against him and, therefore must be discarded from consideration. It is a confession which was not recorded according to the provisions of

law and, therefore, Sri N. B. Singh, the Magistrate, cannot be permitted to depose about it. It was also a statement which was extorted by unfair

means.

Lastly we may observe that even if Ex. P 2 had been admissible in evidence and free from other infirmities we would not have departed from the

well established rule of prudence namely that an accused should not be convicted on the basis of a retracted confession alone, unless there is some

corroborative evidence. There is nothing on the record to corroborate Ex. P2, except a mass of false and fabricated evidence.

30. As a result there is no evidence left against the appellant. We, therefore, set aside the order of conviction passed against the appellant and

acquit him. We have already rejected the reference made by the Sessions Judge and passed an order directing that the appellant should be

released from jail, unless wanted in connection with some other case.